SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~904~~ 913

JIM DUCKWORTH,

Appellant,

vs.

THE STATE OF ARKANSAS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT AS TO JURISDICTION.

HAROLD R. RATCLIFF,
CECIL NANCE,
Counsel for Appellant.

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IN THE SUPREME COURT OF ARKANSAS

JIM DUCKWORTH,

Appellant,

vs.

THE STATE OF ARKANSAS.

Appellee.

JURISDICTIONAL STATEMENT.

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, the above named appellant files this, his separate statement, disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the decree of affirmance appealed from herein as follows:

I.

Basis Upon Which it is Contended the Supreme Court Has Jurisdiction.

The Supreme Court of Arkansas has sustained a statute of Arkansas against the contention that the said statute is repugnant to and in conflict with Article I, Section 8, Clause 3, of the Constitution of the United States.

II.

Statutory Provision Believed to Sustain Jurisdiction.

The statutory provision believed to sustain the appellate jurisdiction is Section 237 (a) of the Judicial Code; 28

U. S. C. A. 344 (a); the Act of January 31, 1928, 28 U. S. C. A. 861 (a) 861 (b), 45 Stat. 54.

III.

The Statute of the State, the Validity of Which is Involved.

The statute of the State of Arkansas the validity of which attacked by the appellant is as follows: Section 14177 of Pope's Digest of the Statutes of Arkansas (Act No. 109 of 1935, Sec. 5).

> "14177-(a) PERMIT TO TRANSPORT MUST ACCOMPANY SHIPMENT.—It shall be unlawful for any person to ship or transport or cause to be shipped or transported into the State of Arkansas, any distilled spirits from points without the State, without first having obtained a permit from the Commissioner of Revenues, and no railroad company, or express company, or bonded truck company or truck line operating under a certificate or permit issued by the Arkansas Corporation Commission or river transportation company shall receive for shipment or ship into this state any package or receptacle containing distilled spirits unless a copy of said permit showing that payment of such taxes as are required by law have been made shall accompany such shipment. Said permit shall be in such form as may be prescribed by the Commissioner of Revenues, and all such shipments into the State shall be governed by such rules and regulations as may be promulgated by said Commissioner but said railroad or express company or river transportation company shall not be required to obtain any permit to transport distilled spirits but shall be subject to all rules and regulations promulgated by the Commissioner of Revenues.
>
> (b) It shall be unlawful for any person who is permitted by law to manufacture and/or sell and/or transport distilled spirits to transport or cause to be transported distilled spirits by any means of trans-

portation except as may be prescribed by the rules and regulations of the Commissioner of Revenues, other than except such spirits may be transported by truck or wagon from and to freight or express depots, to and from the place or places of business of said permittees and upon the premises of said permittees and from and to one place of business to another place of business of said permittee, provided that the owner of trucks or wagons transporting distilled liquor as aforesaid, excepting trucks and wagons owned and operated by a railroad or express company, or bonded truck company or truck line operating under a certificate or permit issued by the Arkansas Corporation Commission, or a river transportation company, or by the person permitted by law to manufacture and/or sell and/or transport distilled spirits shall produce a permit to engage in said transportation and shall execute a bond satisfactory in amount, form and as to surety, to be approved by the Commissioner or Revenues, conditioned upon the lawful transportation of such spirits."

IV.

Date of Judgment or Decree.

The date of the decree sought to be reviewed herein is March 10, 1941, and the date upon which the application for appeal is presented is March 18, 1941.

V.

Nature of the Case and Rulings of the Court Bringing the Case Within Jurisdictional Provisions Relied Upon.

Under the uncontroverted facts in the case, the appellant was transporting a shipment consisting of 100 cases of whiskey from Cairo, Illinois, to Columbia, Mississippi. In the course of the transportation of this shipment appellant intended to pass through the State of Arkansas and did actually enter the State of Arkansas. There was no inten-

tion to sell, dispose of or in any manner use any of the whiskey in question within the State of Arkansas. The appellant was arrested by State Police of the State of Arkansas on the highway while the truck in which the whiskey was contained was actually in motion and en route to its destination in Columbia, Mississippi. The highway upon which the appellant was arrested is a through direct route from Cairo, Illinois to Columbia, Mississippi (Record 11-12-13. Opinion of the Supreme Court of Arkansas—Note 3).

The challenged statute of the State of Arkansas prohibits the transportation of distilled spirits into the State of Arkansas without first obtaining a permit from the Commissioner of Revenues of the State of Arkansas and another section of the same statute (Sec. 14178 Pope's Digest of Arkansas Statutes—Act 109, Sec. 6, Acts of 1935), levies a tax upon distilled spirits transported into the State of Arkansas.

It being conceded and found by the Supreme Court of Arkansas that the shipment of distilled spirits herein involved was not intended for any use whatsoever within the State of Arkansas, but on the contrary was a through shipment originating in Cairo, Illinois, and consigned to Columbia, Mississippi, the statute in question imposes a tax and an unreasonable burden upon and constitutes a regulation of interstate commerce by the State of Arkansas which is prohibited by Article I, Section 8, Paragraph 3 of the Constitution of the United States.

In its opinion the Supreme Court of Arkansas held the challenged statute valid as against the contention that when applied to the shipment here involved it is repugnant to and in conflict with Article 1, Section 8, Clause 3 of the Constitution of the United States (Opinion, Supreme Court of Arkansas, pp. 1-3-4), and affirmed the judgment of the trial court imposing a fine of five hundred dollars upon the appellant.

VI.

Grounds Upon Which it is Contended the Questions Involved Are Substantial.

The Twenty-first Amendment only prohibits the transportation or importation of intoxicating liquors *into* a state for delivery or use *therein* in violation of the laws thereof.

The only four Acts of Congress dealing with interstate commerce in intoxicants, the Wilson Act (Act of August 8, 1890, 26 Stat. 313, 27 U. S. C. A. 121), the Webb-Kenyon Act (Act of March 1, 1913, 37 Stat. 699, 27 U. S. C. A. 122), the Reed Amendment (Act of February 27, 1919, 40 Stat. 1057, 27 U. S. C. A. 1231) and the Liquor Enforcement Act of 1936 (Act of June 25, 1936, 27 U. S. C. A. 223) use the word "into" as distinguished from through.

The Supreme Court of the United States has defined the word "into" as used in the Federal laws relating to interstate commerce in intoxicants as referring to the state of destination—not a state *through* which the intoxicants pass en route. (*U. S.* v. *Gudger*, 249 U. S. 373, 63 L. Ed. 653.)

Several of the states have followed the reasoning of the *U. S.* v. *Gudger*, holding that there is no authority in the state to regulate a shipment of intoxicants which merely passes through the state in interstate commerce. *McCauless* v. *Graham*, January, 1941, 176 Tennessee —, 146 S. W. (2d) 137 (adv. sheets) *Surles* v. *Commonwealth*, 1939, 172 Va. 573, 200 S. E. 639.

While the precise point here raised has not been decided by the Supreme Court of the United States, the opinion in *Gudger* v. *U. S.* is applicable, and the decision of the Supreme Court of Arkansas is in direct conflict therewith, as well as with the decisions of Tennessee and Virginia.

VII.

Stage of Proceedings and Manner in Which Federal Questions Were Raised.

The Federal question made in this cause was first raised upon the arrangement of the appellant in the Municipal Court of the City of Blytheville, Mississippi County, Arkansas. The question was again raised upon the trial *de novo* on appeal to the Circuit Court of Mississippi County, Arkansas. Original pleadings in criminal cases in Arkansas being oral, the record is silent as to when the Federal question was first raised. The Federal question was again raised in the trial court, the Circuit Court of Mississippi County, Arkansas, by the appellant's motion for a new trial. (R. 8-9.) This motion for new trial contains the following assignments of error:

> "(6) If Section 14177 of Pope's Digest of the Statutes of Arkansas be construed to apply to shipments such as the one here involved, that is, a shipment originating in Illinois, destined for Mississippi and merely passing through the State of Arkansas, then said Section 14177 of Pope's Digest of the Statutes of Arkansas is unconstitutional and void because the said section is in conflict with Article I, Section 8, Paragraph 3 of the Constitution of the United States.
>
> "(7) The Court erred in finding the defendant guilty of a violation of Section 14177, Pope's Digest of the Statutes of Arkansas, because from all the evidence, the shipment of whiskey involved, originating in Illinois, was consigned and en route to Columbia, Mississippi, and was merely passing through the State of Arkansas and was interstate commerce between Illinois and Mississippi and the State of Arkansas has not undertaken to and has no authority to regulate, tax, or in any manner interfere with such a shipment of whiskey or levy any tax whatsoever upon same."

The trial court in general terms overruled the motion for a new trial (R. 10).

The Federal question was again raised in the brief filed on behalf of appellant in the Supreme Court of Arkansas. Under the rules of the Supreme Court of Arkansas, no specific assignment of error is made in the brief or filed with the Court, but the entire brief deals with the Federal question involved.

VIII.

Manner in Which Question Involved Was Passed Upon by the Court.

The Supreme Court of Arkansas held the questioned statute of the State of Arkansas to be valid; held that Arkansas could regulate a shipment of distilled spirits such as the one here involved; and affirmed a judgment assessing a fine of five hundred dollars against the appellant for violation of the challenged statute.

The Supreme Court of Arkansas held that the Arkansas Statute (Section 14177, Pope's Digest of the Statutes of Arkansas—Act 109 of 1935) prohibiting transportation of distilled spirits into the State without a permit from the Commissioner of Revenues and laying a tax upon such transportation applies not only to shipments to points within Arkansas, but also to shipments originating in Illinois consigned to Mississippi and merely passing through Arkansas. The Supreme Court of Arkansas said: "In the case at bar, the commodity originated in Illinois, and its destination was Mississippi. Arkansas was a mere transportation conduit through which it passed." (Opinion, Supreme Court of Arkansas, p. 3.)

The Court also said: "Other than Act 109, there is no statute dealing with transportation in the sense contemplated by that measure. It must be assumed, therefore, that the General Assembly intended to cover all requirements and that the term 'into' as used in the Act includes

shipments entering the State but consigned to points within or beyond." (Opinion, Supreme Court of Arkansas, p. 2.)

The Supreme Court of Arkansas held the challenged statute to be valid as against the contention that it is repugnant to the Commerce Clause of the Constitution of the United States. The Court said: "Counsel for appellant say: 'One question and one only, is presented: that is, Does the State have power to regulate a shipment of liquor which is merely passing through Arkansas in interstate commerce?'

"Our answer is that the State does have such right." (Opinion, Supreme Court of Arkansas, p. 1.) And again: "If we concede that some burden has been placed upon such commerce, the answer is that it may be done." (Opinion, Supreme Court of Arkansas, p. 3.)

Thus the Supreme Court of Arkansas has held that that State may regulate, burden and tax interstate commerce in intoxicants which merely pass through Arkansas.

IX.

Copy of Opinions on Rendition of Judgment.

A copy of the opinion of the Supreme Court of Arkansas, duly certified is hereto attached and appended.

X.

Cases Believed to Sustain Jurisdiction.

Western Turf Ass'n vs. *Greenberg*, 204 U. S. 359, 27 S. Ct. 384, 51 L. Ed. 520; *James Stewart & Co.* vs. *Sadrakula*, 309 U. S. 94, 60 S. Ct. 431, 84 L. Ed. 596.

Respectfully submitted.

(S.) HAROLD R. RATCLIFF,
(S.) CECIL NANCE,
Attorneys for Appellant.

Filed March 18, 1941.
C. R. STEVENSON, *Clerk.*

EXHIBIT "A".

IN THE SUPREME COURT OF ARKANSAS,
March 10, 1941.

No. 143.

DUCKWORTH

v.

STATE

GRIFFIN SMITH, *C. J.*:

Jim Duckworth was found guilty of transporting alcoholic liquors through Arkansas without having procured a permit from the commissioner of revenues. He was fined $500.[1]

The judgment recites that the cause was heard[2] "upon the stipulations of witnesses' testimony and the argument of counsel". Essentials of the agreed statement are in the margin.[3]

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[1] The cause originated in the municipal court of Blytheville, where it was alleged that liquor had been transported into the State in violation of § 14177 of Pope's Digest. (Act 109, approved March 16, 1935.) The municipal court assessed a fine of $500. The defendant appealed to circuit court.

[2] A jury was waived.

[3] The State policeman who made the arrest, if called as a witness would testify that Duckworth was detained Dec. 11, 1940, on Highway No. 61. In the glove compartment of the Chevrolet truck the defendant was driving were found four half pint bottles of liquor, one of which had been opened. It was not full. In the truck were 100 cases of "liquor", upon all of which the Federal tax had been paid but the Arkansas tax had not. The truck displayed 1940 Arkansas motor vehicle license plates. License plates issued by the State of Mississippi were found under the floor mat. In Duckworth's possession was an invoice of Royal Distiller's Products, Cairo, Illinois, showing sale December 10 of 100 cases of liquor to Jack Spiers, Columbia, Miss., for $1,691.25.

It was further agreed that Jack Spiers, if called, would testify that he is in the wholesale whiskey business at "Club Marion", in Columbia, Miss. He held a Federal wholesale liquor dealer's permit and owned the truck driven by Duckworth. He had sent Duckworth from Columbia to Cairo with instructions to purchase the liquor. None was intended for sale, gift, or other distribution in Arkansas. On cross-examination the witness would testify that the liquor was intended to be sold in Mississippi in violation of the laws of that State. Duckworth and Spiers resided in Mississippi, and neither had a place of business in Arkansas.

An appeal involving construction of § 14177 of Pope's Digest was before this court in 1939. *Jones v. State*, 198 Ark. 354, 129 S. W. 2d 249. In that case the defendant was charged with transporting fifty cases of "taxpaid liquor"[4] from Illinois to Oklahoma by way of Arkansas.

In the instant appeal it is insisted that in the Jones case the right of Arkansas to tax, regulate, or condition interstate shipments was not properly presented.[5] It is also urged that the Jones case was based upon Haumschilt v. State, 142 Tenn. 520, 221 S. W. 196, and that the Haumschilt case has been overruled by the supreme court of Tennessee.[6]

Counsel for appellant say: "One question, and one only, is presented: that is, Does the state have power to regulate a shipment of liquor which is merely passing through Arkansas in interstate commerce"?

Our answer is that the state does have such right.

In McCanless, Commissioner, v. Graham (Tennessee Supreme Court) the proceedings were not under the criminal code. The appellant, engaged in interstate transportation of liquors, was detained on a charge that the commodity was contraband. In the Tennessee chancery court it was held that the statutes[7] did not authorize confiscation of such property. The department of finance and taxation had issued a license permitting Graham to transport the liquor. After mentioning that the only act engaged in by Graham "which can in any wise be related to [the Tennessee statutes] was that of transporting intoxicating liquors through dry counties of the state", it was said:

"But, under the stipulation, this was a mere incident of interstate transportation, and if the statutes should be construed so as to prohibit such transportation, they would be void because violative of the commerce clause of the United States constitution * * *. We are further of the

[4] The reference is to Federal taxes. The Arkansas strip stamps had not been attached.

[5] The constitutional question in the *Jones* case was raised and was presented by able counsel.

[6] *George F. McCanless, Commissioner of Finance and Taxation, v. Grover Graham.* Three other cases involving the same question were consolidated. (146 S. W. 2d 137.)

[7] Chapters 49 and 194 of the Public Acts of 1939.

opinion, as was the chancellor, that the seizure was illegal because appellee was engaged in interstate commerce".[8]

Consonant with the Tennessee courts, this court has held (*Jones* v. *State*) that liquor in interstate transit is not subject to confiscation.

Since we determined in the Jones case that the Act of March 16, 1935 (Pope's Digest, § 14177) " * * * makes it unlawful for any person to ship or transport, or cause to be shipped or transported, into the state of Arkansas, any distilled spirits from points without the state, *without first having obtained a permit from the commissioner of revenues*,[9] but three questions are to be determined here: Is such regulation reasonable in view of the state's problem in dealing with the manufacture, sale, and transportation of liquor? Is it a burden on interstate commerce? Does "Into" as used in Act 109 mean "into and out of"?

Although in appellant's motion for a new trial it is alleged that application for permission to move the liquor was made of the commissioner of revenues, and refused, the agreed statement contains nothing to this effect. We must assume, therefore, that no such request was made.

Rules of the department of revenues, promulgated by the commissioner under authority of Act 109 of 1935, (in effect during all of December, 1940)[10] provide that "It shall be unlawful for any person to ship, transport, cause to be shipped or transported into the state of Arkansas any distilled spirits from *points without the state* [11] without having first obtained a permit from the commissioner of revenues, or his duly authorized agent". This regulation is copied almost *verbatim* from § 5(a) of Act. 109. It must be conceded that the Act is somewhat obscure regarding strictly interstate transportation of liquors; but there is a very definite requirement that before shipments may be brought "into the state" from points "without the state"

[8] In support of this statement the following cases are cited: *United States* v. *Gudger*, 249 U. S. 373, 63 L. Ed. 563; *United States* v. *Collins*, 263 Fed. 657; *Whiting* v. *United States*, 263 Fed. 477; *Preyer* v. *United States*, 260 Fed. 157; *Surles* v. *Commonwealth*, 172 Va. 573, 200 S. E. 636.

[9] Italics supplied.

[10] New rules, effective February 3, 1941, have been published.

[11] The italicized words are underscored in the mimeographed regulations.

permission of the commissioner of revenues must be obtained. But, it is argued, this section, and other sections of Act 109 dealing with transportation, have reference to liquors brought from without the state intended for intrastate usage; hence, appellant contends, "into" does not mean into and through, but "into and at rest".

First.—Other than Act 109 there is no statute dealing with transportation in the sense contemplated by that measure. It must be assumed, therefore, that the general assembly intended to cover all requirements, and that the term "into" as used in the Act includes shipments entering the state, but consigned to points within or beyond. This construction is contrary to that of some courts dealing with related transactions, and we adhere to such definition only because it is our belief that the general assembly intended it so, although more appropriate language could have been used.[12]

Second.—The commissioner's regulation requiring those proposing to transport liquor through Arkansas to procure a permit is not in excess of authority conferred by the legislature.

Third.—The state relies upon Ziffrin v. Reeves [13] to support the commissioner's action, and to sustain the assertion that the regulation does not impose a burden on interstate commerce. In that case it was said by Mr. Justice McReynolds, who wrote the opinion:

"The Twenty-first Amendment [14] sanctions the right of a state to legislate concerning intoxicating liquors brought from without, undeterred by the commerce clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irre-

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[12] *Contra*, see *Ryman* v. *Legg*, 176 S. E. 403, 179 Ga. 534; *State* v. *Williams*, 61 S. E. 61, 68, 146 N. C. 618, 17 L. R. A., N. S., 299, 14 Ann. Cas. 562.

[13] Ky. 1939, 60 S. Ct. 163, 308 U. S. 132, 84 L. Ed. 128.

[14] "Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed. Sec. 2. The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

spective of when or where produced or obtained, or the use to which they are to be put. Furthermore, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them."

Facts before the court were that the appellant, an Indiana corporation, had continuously received whiskey from distillers in Kentucky for direct carriage to consignees in Chicago. The Kentucky Alcoholic Beverage Control Law of 1938 restricted the agencies by which whiskey might be transported.[15]

After commenting upon the power of states to prohibit manufacture, sale, and transportation of liquors, and affirming Kentucky's right to condition transportation, the opinion says:

"We cannot accept appellant's contention that because whiskey is intended for transportation beyond the State lines the distiller may disregard the inhibitions of the statute by delivering to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity".

It will be observed that § 2 of the Twenty-first Amendment prohibits the transportation or importation of intoxicating liquors *into* any state, territory, etc., *for delivery or use therein*[16] in violation of the laws of the state.

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[15] In sum, counsel for the appellant said: "The complaint charges that the control law is unconstitutional because repugnant to the commerce, due process and equal protection clauses of the Federal Constitution, in that, under pain of excessive penalties, it undertakes to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively. Also: Intoxicating liquors are legitimate articles of interstate commerce unless Federal law has declared otherwise. Interstate commerce includes both importation of property within a State and exportation therefrom. Prior to the Wilson and Webb-Kenyon Acts, and the Twenty-first Amendment, the power of the States over intoxicants in both of these movements were limited by the commerce clause. These enactments relate to importations only. Exports remain as always, subject to that clause".

[16] Italics supplied.

The agreed statement in the case at bar concedes that the liquor carried by Duckworth was not intended for delivery or use in Arkansas.

It is our view that the Ziffrin case is not altogether in point with the controversy here. The Ziffrin corporation proposed to transport into Illinois liquors manufactured in Kentucky. The Supreme Court of the United States predicated its holding upon the fact that inasmuch as Kentucky had the right to prohibit the manufacture, transportation, and sale of whiskey, it had, as an incident to its power to prohibit, the right to designate the agencies of transportation, as a class, and to prohibit transportation by any other class. This, it was thought, was not a burden upon interstate commerce. Expressed differently, Illinois had no fundamental right to receive liquors from Kentucky; and lacking that right it could not complain of conditions under which limited transportation was permitted.

In the case at bar the commodity originated in Illinois, and its destination was Mississippi. Arkansas was a mere transportation conduit through which it passed. Appellant might have received a permit if he had applied for it; but, more than eighteen months after this Court had held such transportation to be unlawful, he arrogated to himself the right to disregard reasonable legal prerequisites, and now complains that our decision places a burden on interstate commerce.

If we concede that some burden has been placed upon such commerce, the answer is that it may be done.

In the recent case of South Carolina Highway Department *v.* Barnwell Bros., 303 U. S. 177,[17] it was said: "While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, and Cooley *v.* Board of Port Wardens, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local

[17] The opinion was handed down February 14, 1938.

character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints".

The distinction (mentioned in a footnote to the Barnwell Bros. case and citing Hall *v.* De Cuir, 95 U. S. 485, and other decisions) is this: "State regulation affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantages to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted".

After citing and commenting upon former decisions, the court said: "In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the congress permits because it is an inseparable incident of the exercise of legislative authority, which, under the constitution, has been left to the states".

Cooley *v.* Board of Port Wardens, referred to by Mr. Justice Stone (who wrote the opinion in the Barnwell Bros. case) held that the mere grant of the commercial power to congress did not of itself forbid states from passing laws regulating pilotage. In one of the headnotes it is said: "The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusive in congress in the former, but not in the latter class".[18]

[18] A Pennsylvania law provided that a vessel that neglected or refused to take a pilot should forfeit and pay to the master warden of the pilots, for use of the society for the relief of distressed and decayed pilots, their widows and children, one-half of the amount of the regular pilotage. The law was held to be an appropriate part of a general system of regulations on the subject of pilotage, and could not be considered as a covert attempt to legislate upon another subject.

As late as 1935 the Supreme Court of the United States,[19] in a case appealed from the Supreme Court of Alabama, (see footnote)[20] held that state regulations incidentally affecting interstate commerce were not invalid.

In Ouachita Packet Co. *v.* Aiken,[21] a case originating in Louisiana and decided in 1887, the court said, at pages 447-448: "In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulation made by the states, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority".

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[19] *Clyde Mallory Lines* v. *Alabama, ex rel. State Docks Commission*, 296 U. S. 261.

[20] Headnote to the opinion of the Supreme Court of the United States, after mentioning that art. 1, § 10, cl. 3 of the Constitution provides that no State shall, without the consent of Congress, lay any duty of tonnage, says that the inhibition embraces taxes and duties which operate to impose a charge for the privilege of entering, trading in, or lying in port. It was then said in effect that invalidity [of the Alabama statute] under this clause depends upon the basis of the exaction, not upon measure by tonnage. This clause does not prevent a reasonable charge to defray the expense of policing service rendered by the State to insure safety and facility of movement of vessels using the harbors. State harbor regulation, and charges to defray the cost, though they may incidentally affect foreign or interstate commerce, are not forbidden by the commerce clause so long as they do not impede the free flow of commerce or conflict with any regulation of Congress."

[21] 121 U. S. 444. Complainants were owners of steamboats plying between New Orleans and other ports and places on the Mississippi river and its branches in Louisiana. The burden complained of was that the rates of wharfage exacted by the city under State legislative authority for vessels at New Orleans were excessive. Contention was that the charges were unreasonable as wharfage, and in effect a direct burden on commerce. The court said: "The case is clearly within the principal of the former decisions of this court, which affirm the right of a State, in the absence of regulation by Congress, to establish, manage, and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce."

New York ex rel. Silz *v. Hesterberg*, Sheriff, 211 U. S. 31, and Geer *v.* Connecticut, 161 U. S. 519, are of interest and have application.[22]

The true rule to be applied here is that announced in Hayes *v.* U. S., C. C. A. Okla. 1940, 112 F. 2d 417. The thirteenth headnote is: "Although the Twenty-first Amendment to the Federal Constitution surrenders to each state the power to prohibit or condition importations of intoxicating liquor in interstate commerce into the state, the amendment does not surrender power of congress to prohibit or regulate transportation of intoxicating liquor in interstate commerce, and congress has power to enact legislation to execute [the] amendment and to penalize its violation".

In the absence of action by congress there is no doubt of the right of a state to require those engaged in interstate transportation of liquors—those who use Arkansas highways and other state facilities and who receive its police protection while engaged in such commercial pursuit—to procure from the Commissioner of Revenues a permit conforming to regulations not inharmonious with Act 109 of 1935. No revenue fee may be exacted for the permit, the only charge being that necessary to defray cost of issuance, police inspection, and necessary reports. The Commissioner's refusal or failure to promptly comply in reasonable circumstances would be subject to judicial review and immediate compulsion through mandamus.

Affirmed.

[22] In the *Hesterberg* case the relator, a dealer in imported game, was arrested for unlawfully having in his possession on March 30, 1905, (being within the "closed" season in the borough of Brooklyn, city of New York) a golden plover lawfully killed in England, and grouse lawfully killed in Russia. They were distinguishable from plover and grouse grown in New York. The court said (pp. 40-41): "That a State may not pass laws directly regulating foreign and interstate commerce has been frequently held by the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the States in the exercise of their police power, not in conflict with laws of Congress on the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws."

In the *Geer* case (p. 534) it was said: "The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected."